90-1775

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GARY COMMUNITY MENTAL HEALTH CENTER, INC., CHARLIE BROWN, KENNETH PHILLIPS and WENDELL ROBINSON,

Petitioners,

v.

DENISE TRAVIS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND MOTION TO VACATE THE JUDGMENT BELOW

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QUESTIONS PRESENTED FOR REVIEW

A. Whether 29 U.S.C. § 216(b) authorize the award of punitive damages.

B. Whether 29 U.S.C. § 216(b) authorize the award of compensatory damages for emotional distress in addition to liquidated damages.

C. Whether a corporate employer and three (3) of its employees who collectively engage in decision making process which leads to the termination of an employee, can be found liable under 29 U.S.C. § 215(a)(3) for having engaged in a conspiracy to terminate said employee.

D. Whether an employee terminated by an employer, allegedly based upon employee's testifying in previous trial of charges brought against employer by another employee for violations of Fair Labor Standards Act 29 U.S.C. § 215(a)(3), has standing to bring action under 29 U.S.C. § 215(a)(3) where employee claims that the discharge is in retaliation for having testified at previous trial.

E. Whether Fed. R. Civ. P. 54(c) authorizes a District Court or Court of Appeals to change a special interrogatories jury verdict, from one specifically awarding compensatory and punitive damages against individual defendants for violation of 42 U.S.C. § 1985(2) which is reversed by the Court of Appeals, to an award of compensatory and punitive damages against the same violation of 29 U.S.C. § 215(a)(3) for which the jury awarded no damages.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners Gary Community Mental Health Center, Inc. ("GCMH")[1], Charlie Brown ("BROWN"), Kenneth Phillips ("PHILLIPS") and Wendell Robinson ("ROBINSON") respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit affirming the District Court's judgment in favor of Respondent which appears in Appendix A to this Petition, and is reported at 921 F.2d 108.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals affirming the District Court's judgment was entered on December 27, 1990 (Appendix A). A petition for rehearing, timely filed, was denied on January 31, 1991 (Appendix B). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Statutes involved are set forth in Appendix C. They are:

> "The Fair Labor Standards Amendments of 1977". 29 U.S.C. §§ 206 et seq. The pertinent sections are §§ 215(a)(3) and 216(b), and the "Age Discrimination in Employment Act of 1967 as Amended". 29 U.S.C. §§ 621 et seq The pertinent section is § 626(b).

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[1] A not-for-profit Indiana corporation has no parent companies, subsidiaries or affiliates.

STATEMENT OF THE CASE

This case originated upon the filing in the U.S. District Court for the Northern District of Indiana, Hammond Division, of a complaint by Respondent, an employee of Petitioner "GCMHC" alleging that Petitioners, GCMHC (employer), Brown, Phillips and Robinson employees of GCMHC, entered into a conspiracy in violation 42 U.S.C. § 1985(2) which resulted in the termination of Respondent's employment and that said termination was in retaliation for Respondent having testified in a previous trial of charges brought against "GCMHC" by another employee for violations of the Fair Labor Standards Act 29 U.S.C. § 215(a)(3) and that her termination was in violation of § 215(a)(3) of the Fair Labor Standards Act.

The Respondent in her complaint did not claim unpaid minimum wages, or unpaid overtime compensation and testified at trial that she suffered no loss of wages, sick pay, vacation pay or any other benefit of employment. (R. 343-358).

The jury in the district court returned a special interrogatories verdict and specifically found that Respondent sustained compensatory damages as a result of Petitioners conspiracy and awarded her $35,000.00 in damages.

The jury in its special interrogatories verdict specifically found that Petitioners conspiracy to discharge Respondent was motivated by ill will, or malice, or involved reckless or callous disregard or indifference to Respondent's rights. And found that Respondent [was] entitled to punitive damages and assess[ed] such damages in the amount of $3,500 each against Petitioners Brown, Phillips and Robinson and $35,000 against GCMHC.

The district court awarded Respondent liquidated damages under § 216(b) of the Fair Labor Standards Act in the amount of $2,782.38.

In reversing the District Court Judgment finding Petitioners liable for violation of 42 U.S.C. § 1985(2), the U.S. Court of Appeals for the Seventh Circuit held that since intra-corporate discussions are not "conspiracies" within the meaning of 42 U.S.C. § 1985(2) the Respondent's relief depends on the Fair Labor Standards Act.

The court found that since Congress amended § 216(b) of the FLSA in 1977 by adding the language: "Any employer who violates the provisions of § 15(a)(3) of this Act [29 U.S.C. § 215(a)(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of § 15(a)(3), including without limitation employment, reinstatement or promotion and the payment of wages lost and an additional equal amount as liquidated damages." Pub. L. 95-151, 91 Stat. 1252(1977). It was the judgment of the court of appeals that "This amendment authorizes "legal" relief, a term commonly understood to include compensatory and punitive damages." (App. A).

The court concluded that since "Fed. R. Civ. P. 54(c) requires courts to award the relief to which the prevailing party is entitled, even if that party did not request the relief or relied on the wrong statute." Therefore, the court held that the District Court had the authority to change the special interrogatory jury verdict finding Petitioners liable under 42 U.S.C. § 1985(2) to a finding of liability under 29 U.S.C. § 216(b) even though the jury did not award Respondent damages under said section.

REASONS FOR GRANTING WRIT

The United States Court of Appeals for the Seventh Circuit in the present case has decided that the 1977 amendments to § 216(b) of the Fair Labor Standards Act authorizes the award of punitive damages and compensation for emotional distress in the absence of physical injury and loss

wages. And that the amendment authorize the award of liquidated damages where no claim has been asserted for unpaid minimum wages, unpaid overtime compensation or loss of any benefits of employment.

The court in its decision (App. A) admits that it could not find any case interpreting the "appropriate legal or equitable relief" language of the 1977 amendment to § 216(b) of the FLSA and that the legislative history was unhelpful and did not describe what relief might be "appropriate". H.R. Conf. Rep. No. 95-497, 95th Cong., 1st Sess. 16 (1977).

The Court of Appeals in the present case has decided an important question of federal law which has not been, but should be, settled by this Court.

The Court of Appeals in the present case has decided a federal question(s) in a way that conflicts with applicable decisions of this Court (and cases in the First, Third, Fourth, Fifth and Ninth circuits) in *Lorillard* v. *Pons*, 434 U.S. 575, 579, 98 S.Ct. 866, 868 (1978); *Overnight Transportation Co.* v. *Missel*, 316 U.S. 572, 62 S.Ct. 1216 (1942), (punitive damages); *Powell* v. *Washington Post Co.*, 267 F.2d 651 (D.C. Cir. 1959), cert. denied, 360 U.S. 930, 79 S.Ct. 1449; *James Dickinson Farm Mortg. Co.* v. *Harry*, 273 U.S. 119, 47 S.Ct. 308 (1926). (compensatory damages); *Marshall* v. *Brunner*, 668 F.2d 748 (1982) holding that punitive and pain and suffering damages are not obtainable under the § 216(b) of the FLSA nor § 626(b) the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ("ADEA").

The decision of the court conflicts with its own decision in *Pfeiffer* v. *Essex Wire Corp*, 682 F.2d 684 (1982). In *Pfeiffer*, which was decided after the 1977 amendments to § 216(b), and arose under the ADEA, the district court certified to the Seventh Circuit the following questions:

> A. Whether compensatory damages for pain and suffering are properly recoverable under the Age

Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq.

B. Whether punitive damages are properly recoverable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq.

In denying a punitive damage award in *Pfeiffer* the court concluded that "Congress [could] be presumed to have had the knowledge of the interpretation given the FLSA with it enacted the ADEA, *Lorillard* v. *Pons*, 434 U.S. 575, 581, 98 S.Ct. 866, 870, 55 L.Ed.2d 40 (1978), therefore if it intended punitive and pain and suffering damages to be obtainable under the ADEA, that availability must be the result of the selective changes made in the remedial provisions of the FLSA to obtain the final version of the ADEA."

CONCLUSION

The question of whether punitive damages are authorized by the 1977 amendments to § 216(b) of the Fair Labor Standards Act and by implication authorized under § 621(b) of the Age Discrimination in Employment Act has not been, but should be settled by this Court.

Respectfully submitted,

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APPENDIX

A.

COURT OF APPEALS JUDGMENT AND OPINION

B.

COURT OF APPEALS ORDER DENYING REHEARING

C.

STATUTES INVOLVED FEDERAL RULE CIVIL PROCEDURE 54C INVOLVED

Denise TRAVIS, Plaintiff-Appellee,

v.

GARY COMMUNITY MENTAL HEALTH CENTER, INC., et al., Defendants-Appellants.

No. 90-1412.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 9, 1990.

Decided Dec. 27, 1990.

Rehearing and Rehearing Denied
Jan. 31, 1991.

Discharged employee brought action against employer, alleging retaliation. Following a jury trial, the United States District Court for the Northern district of Indiana, Rudy Lozano, J., entered a judgment awarding the employee approximately $83,000 in damages plus $21,000 in attorney's fees. Appeal was taken. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) intracorporate discussions were not conspiracies within the meaning of the Ku Klux Klan Act, and thus the Act did not support the award, but (2) the Fair Labor Standards Act supported the award.

Affirmed.

1. Conspiracy ⇐7.5

Intracorporate discussions were not conspiracies within the meaning of the Ku Klux Klan Act, even if corporate managers took multiple steps to carry out their plan, and even

though managers consulted with outside counsel before firing an employee; corporation made decision to fire the employee. 42 U.S.C.A. §§ 1981 et seq.. 1985, 1985(2).

2. Damages ⇐130(1)

Master and Servant ⇐41(1), 46

Award of $83,000 in damages, including $45,500 of punitive damages and $35,000 in emotional distress damages, plus $21,000 in attorney's fees to a retaliatory discharge plaintiff was supportable by the Fair Labor Standards Act (FLSA), even though the plaintiff put most of her reliance on the Ku Klux Klan Act and that Act did not support the award; amendment to FLSA did away with old limitations upon damages without establishing new ones, and compensation for emotional distress and punitive damages are appropriate for intentional torts such as retaliatory discharge. Fair labor Standards Act of 1938, §§ 15(a)(3), 16(b), 29 U.S.C.A. §§ 215(a)(3), 216(b); 42 U.S.C.A. § 1985(2); Fed.Rules Civ.Proc. Rule 54(c), 28 U.S.C.A.

Ivan E. Bodensteiner, Valparaiso, Ind., for plaintiff-appellee.

Douglas M. Grimes, Gary, Ind., for defendants-appellants.

Before BAUER, Chief Judge, and CUDAHY and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

Elliott Cunningham filed suit contending that the Gary Community Mental Health Center, Inc., had not afforded him promised vacation, sick, and holiday pay, and had retaliated against him when he invoked his rights under the Fair Labor Standards Act. The FLSA forbids retaliation. 29 U.S.C. § 215(a)(3). Cunningham subpoenaed Denise Travis, his immediate supervisor, to be a witness at trial. Travis's testimony was helpful to Cunningham, who prevailed.

Within the month, the Center fired both Cunningham and Travis. Travis was on leave expecting a child; the Center demanded that she immediately return her medical insurance card. At the trial in this case a witness explained that Travis was cast out because "she had cost us money". The jury concluded that Travis was the victim of retaliation. She received about $83,000 in damages plus $21,000 in attorney's fees. We must decide whether the remedy is authorized by law. (Defendants' challenge to the verdict was not argued in the opening brief and is waived.)

Instead of standing on § 215(a)(3), Travis put most of her reliance on 42 U.S.C. § 1985(2), which creates a remedy:

> If two or more persons . . . conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified. . . .

Section 1985(2), unlike § 215(a)(3), requires proof of a conspiracy. Travis found the plurality of actors in the managers of the Center. She named as defendants three of the Center's senior executives: Charlie Brown, its Executive Director; Kenneth R. Phillips, its Director of Administration; and Wendell P. Robinson, its Director of Clinical Services. Brown, Phillips, and Robinson discussed discharging Travis, and Brown instructed Phillips to prepare the letter conveying the news.

This intra-corporate conspiracy approach runs smack into *Dombrowski* v. *Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (Stevens, J.), which held that the conspiracy requirement in § 1985(3) "is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm." Travis asks us to distinguish or limit *Dombrowski*. Whittling away at a case is more attractive

if its core principle is wrong than if it is right, for why strain to curtail the application of sound rules? Travis therefore reminds us that *Dombrowski* has not won universal approbation and invites us to rethink the subject.

[1] Two rhetorical questions frame the dispute. (1) Why should action by a single employer be covered by § 1985 just because discussions among the firm's multiple agents precede decision? (2) Why should decisions taken by a plurality of actors be immune from check under § 1985 just because they take the trouble to incorporate? Which questions you pose largely determines the outcome. It is therefore not surprising that courts have reached disparate conclusions. Courts aligned with *Dombrowski* include *Girard* v. *94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70–71 (2d Cir.1976), reaffirmed in *Herrmann* v. *Moore*, 576 F.2d 453, 459 (2d Cir.1978); *Buschi* v. *Kirven*, 775 F.2d 1240, 1251–53 (4th Cir.1985); *Doherty* v. *American Motors Corp.*, 728 F.2d 334, 339–40 (6th Cir.1984); and *Cross* v. *General Motors Corp.*, 721 F.2d 1152, 1156 (8th Cir.1983), reaffirmed in *Bond* v. *IMFS, Inc.*, 727 F.2d 770 (8th Cir.1984). Courts that come out the other way include *Stathos* v. *Bowden*, 728 F.2d 15, 20–21 (1st Cir.1984); *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1256–59 (3d Cir.1978) (in banc), reversed on other grounds, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); and *United States* v. *Hartley*, 678 F.2d 961, 970–72 & n. 14 (11th Cir.1982). Which is the *right* question to ask depends on the function of the statute.

Section 1985 descends from the Civil Rights Act of 1871, commonly known as the Ku Klux Klan Act. *Griffin* v. *Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), recounts its background. See also *United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983). The Radical Republicans in Congress wanted to put down the Invisible Empire, whose night riders were terrorizing the newly freed blacks and their white supporters. Congress was concerned not about unilateral

action but about organized, almost society-wide resistance to emancipation and civil rights. Fear of violence (a theme running through the text of and debates on the 1871 act) could unit disparate centers of influence, closing opportunities to the freed men. Bigoted acts by a single firm, acting independently, pose risks of lesser caliber.

When Congress drafted § 1985 it was understood that corporate employees acting to pursue the business of the firm could not be treated as conspirators. Courts looked past the individual acts to concentrate on the collective decision. E.g., *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636, 4 L.Ed. 629 (1819). Long before Congress enacted § 1985, Blackstone remarked that the corporation and its managers are "considered as one person in law". William Blackstone, 1 *Commentaries on the Laws of England* *456 (1st ed. 1765). Neither the text and structure nor the background of § 1985 imply a decision to discard this understanding, which remains the accepted wisdom. E.g., 10 *Fletcher Cyclopedia of the Law of Private Corporations* § 4884 (Lenore M. Zajdel ed. 1986). Intra-corporate dealings under § 1985 therefore should receive the same treatment as intra-corporate dealings under the Sherman Act, enacted 19 years later with similar inattention to such details. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2781, 81 L.Ed.2d 628 (1984). *Copperweld* emphasizes that the antitrust laws aim at preserving independent economic decisions, which supposes cooperation inside economic entities—cooperation that cannot be called "conspiratorial" without defeating the foundation of competition. Similarly, § 1985 aims at preserving independent decisions by persons or business entities, free of the pressure that can be generated by conspiracies, and again intra-corporate discussions lie outside the statute's domain.

Remaining doubts we resolve by reference to the principle of *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375–78, 99 S.Ct. 2345, 2350–52, 60 L.Ed.2d

957 (1979), that § 1985 and other statutes of its time should not be read so broadly that they occupy the territory of more recent civil rights laws, providing remedies without the limitations and qualifications Congress introduced when it addressed the question explicitly. See also, e.g., *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 2874–75, 105 L.Ed.2d 132 (1989). The FLSA deals with the subject of this suit and prohibits the Center's conduct; Travis added a claim under § 1985(2) only to escape what she feared would be limitations on the remedy under § 215(a)(3). *Novotny, Patterson*, and other cases counsel against such a use of the Civil War statutes.

Note an important limitation of the principle in *Dombrowski:* members of the Ku Klux Klan could not avoid liability by incorporating, for they would still be trying to organize (through persuasion or terror) multiple centers of social or economic influence. *Dombrowski*, 459 F.2d at 196. the Klan meddled in the business of others; that is what made it dangerous. The Center minded its own business. None of this, moreover, denies that corporate officers are answerable for their own crimes and torts. All *Dombrowski* concluded, and all we reiterate, is that managers of a corporation jointly pursuing its lawful business do not become "conspirators" when acts within the scope of their employment are said to be discriminatory or retaliatory.

Having reexamined the foundation for the conclusion that discussions of corporate business among corporate executives are not "conspiracies", we are ready to address Travis's proposed limitations. One is that *Dombrowski*'s approach should not be "extended" from § 1985(3) to § 1985(2). Nothing in the rationale of *Dombrowski* is lashed to a particular clause of the civil Rights Act of 1871, and there is no sound reason to drive a wedge between its sections. A second distinction is that, before firing Travis, the executives of the Center consulted with Douglas M. Grimes, its outside counsel. Although Grimes was not an employee of the Center, this does not

create a conspiracy. In the end the Center took the decision to fire Travis; only one economic entity participated. If consultation with counsel could create a conspiracy, then *Copperweld* would be a hollow decision, avoidable whenever the corporation discusses its business plans with lawyers, accountants, or other advisers—as all do. Treating involvement of a lawyer as the key unlocking § 1985 would discourage corporations from obtaining legal advice before acting, hardly a sound step to take. *Doherty,* 728 F.2d at 340.

Travis's final proffered limit is that corporate managers become conspirators when they engage in multiple discriminatory (or retaliatory) acts. Some language in *Volk* v. *Coler,* 845 F.2d 1422, 1434–36 (7th Cir.1988), as in *Dombrowski* itself, 459 F.2d at 196, supports this proposal. Yet such a line responds neither to the text nor to the objectives of § 1985. Section 1985 depends on multiple act*ors,* not on multiple ac*ts* of discrimination or retaliation. Sequences such as first chastising an employee and then firing him are neither better nor worse (so far as the objectives of § 1985 are concerned) than is a clean act of discharge. A single corporate executive who made multiple decisions would not be a "conspiracy"; why then would two discriminatory or retaliatory acts approved by a plurality of corporate executives be a conspiracy, if a single act by the same executives is not? We do not think the distinction tenable if the foundation of *Dombrowski* is sound. Judge Manion, concurring in *Volk,* observed that the discussion of *Dombrowski* in the majority opinion is dicta. 845 F.2d at 1439. Now that the question has been presented for decision, we conclude that it does not matter whether the corporate managers took multiple steps to carry out their plan; intra-corporate discussions are not "conspiracies."

[2] Travis's relief depends, then, on the FLSA. Most of the award ($45,500) represents punitive damages, and another $35,000 is compensation for emotional distress attributable to the discharge and revocation of health insurance while Travis was on leave to receive medical care for

complications in her pregnancy. She suffered little loss in wages, because the firing caused such a ruckus within the Center that its managers reinstated her within two months. At oral argument, Travis's lawyer candidly remarked that he pursued the claim under § 1985(2) because, he believed, decisions of the Supreme Court limited the availability of compensatory and punitive damages under the FLSA. So they did, once upon a time, but the landscape changed in 1977.

As enacted in 1938, the FLSA established as remedies the statutory wages and overtime compensation plus "an additional equal amount as liquidated damages" plus attorneys' fees. 29 U.S.C. § 216(b). Compensatory and punitive damages were unavailable. Congress amended the remedial section by adding this language: "Any employer who violates the provisions of section 15(a)(3) of this Act [29 U.S.C. § 215(a)(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement or promotion and the payment of wages lost and an additional equal amount as liquidated damages." Pub.L. 95–151, 91 Stat. 1252 (1977). This amendment authorizes "legal" relief, a term commonly understood to include compensatory and punitive damages.

Because the original text prescribed as a remedy double the shortfall of wages, and the amendment says that damages include this "without limitation", Congress has authorized other measures of relief. Which other forms? The answer has been left to the courts. We could not find any case interpreting this amendment. The legislative history is unhelpful. The language originated in the Senate; the committee report does not discuss it. The Conference Committee adopted the Senate's proposal, remarking that the bill authorizes suits "for appropriate legal or equitable relief" without describing what relief might be "appropriate". H.R.Conf.Rep. No. 95–497, 95th Cong., 1st Sess. 16 (1977).

Appropriate legal relief includes damages. Congress could limit these damages, but the 1977 amendment does away with the old limitations without establishing new ones. Compensation for emotional distress, and punitive damages, are appropriate for intentional torts such as retaliatory discharge. So although § 1985(2) does not support the jury's award, § 216(b) does. Fed.R.Civ.P. 54(c) requires courts to award the relief to which the prevailing party is entitled, even if that party did not request the relief or relied on the wrong statute. Misplace reliance on § 1985(2) does not undercut the verdict; § 216(b) supplies all the authority the district court required.

AFFIRMED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JANUARY 31, 1991

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

DENISE TRAVIS, *Plaintiff-Appellee,* No. 90-1412 v. GARY COMMUNITY MENTAL HEALTH CENTER INC. ET AL., *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. H88-592 Rudy Lozano, *Judge.*

Order

Defendants-Appellants filed a petition for rehearing and suggestion of rehearing en banc on January 9, 1991. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

§ 215. Prohibited acts—Prima facie evidence

(a) After the expiration of one hundred and twenty days from the date of enactment of this Act [enacted June 25, 1938], it shall be unlawful for any person—

(1) to transport, offer for transportation, ship deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of Section 6 or Section 7 [29 USCS §§ 206 or 207], or in violation of any regulation or order of the Administrator issued under Section 14 [29 USCS § 214]; except that no provisions of this Act [29 USCS §§ 201–216, 217–219, 557] shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act [29 USCS §§ 201–216, 217–219, 557] shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act [29 USCS §§ 201, 216, 217–219,557], and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful. [;]

(2) to violate any of the provisions of Section 6 or Section 7 [29 USCS §§ 206 or 207], or any of the provisions of any regulation or order of the Administrator issued under Section 14 [29 USCS §214];

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act [29 USCS §§ 201–216, 217–219, 557], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee. [;]

§ 216. Penalties—Civil and criminal liability—Enforcement procedure—Savings provision

(a) Any person who willfully violates any of the provisions of section 15 [29 USCS § 215] shall upon conviction thereof be

subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act [29 USCS §§ 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USCS § 217] in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USCS §§ 206 or 207] by an employer liable therefor under the provisions of this subsection.

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 USCS §§ 621 et seq.;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Dec. 15, 1967, P. L. 90-202, § 2, 81 Stat. 602.)

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations. The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 USC 209 and 211) [29 USCS §§ 209, 211].

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion. The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 211(b), 216, 217) [29 USCS §§ 21(b), 216, 217], and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS § 623] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 USC 215) [29 USCS § 215]. Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 216, 217) [29

USCS §§ 216, 217]: Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to

deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

Supreme Court, U.S.
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(2)

No. 90-1775

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1990

GARY COMMUNITY MENTAL HEALTH CENTER, INC., CHARLIE BROWN, KENNETH PHILLIPS and WENDELL ROBINSON,

Petitioners,

v.

DENISE TRAVIS,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

IVAN E. BODENSTEINER
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STATEMENT OF THE CASE

The respondent, Ms. Travis, was employed by one of the petitioners, Gary Community Mental Health Center, Inc., (GCMHC) as a supervisor. One of the persons she supervised, Mr. Cunningham, subpoenaed Ms. Travis to testify in federal court in his Fair Labor Standards Act (FLSA) suit against the GCMHC and its director. Ms. Travis's testimony was helpful to Mr. Cunningham. A few weeks after the jury ruled in Mr. Cunningham's favor, both he and Ms. Travis were discharged by the GCMHC. (A-2 - A-3)

Shortly after her discharge, Ms. Travis filed this case in federal court alleging that the discharge violated her rights under the FLSA, 29 U.S.C. §215(a)(3), and 42 U.S.C. §1985(2). In addition to damages, Ms. Travis sought a preliminary injunction reinstating her as an employee of the GCMHC. The reinstatement portion of the case was settled by the parties a few days before the hearing on the request for a preliminary injunction. After a trial the jury returned a verdict in favor of Ms. Travis, finding that she was discharged in retaliation for testifying in Mr. Cunningham's case and awarding her compensatory and punitive damages under 42 U.S.C. §1985(2). Based on this finding of retaliation, the court awarded liquidated damages under the FLSA, 29 U.S.C. §216(b). Any challenge to the jury's findings was deemed waived by the Court of Appeals. (A-3)

The Court of Appeals held that §1985(2) does not support the award of damages because all of the conspirators were officials of the same corporation, the GCMHC. (A-3 - A-7) However, pursuant to Fed. R. Civ. P. 54(c), Judge Easterbrook concluded that all the monetary relief awarded by the jury is supported by the FLSA, §216(b). (A-7 - A-9) Therefore the judgment in favor of Ms. Travis was affirmed.

ARGUMENT

A. Summary of Argument

None of the reasons, set out in Supreme Court Rule 10.1, for granting the discretionary writ of certiorari is present in this case. The decision of the Seventh Circuit Court of Appeals interpreting 29 U.S.C. §216(b), as amended in 1977, does not conflict with a decision of any other state or federal court. In fact, as noted in Judge Easterbrook's opinion, there does not appear to be another decision interpreting the relevant sentence in §216(b). (A-8)

Because Ms. Travis stated a retaliation claim under the FLSA, 29 U.S.C. §215(a)(3), the available relief is governed by the second sentence of §216(b), added in 1977, which states:

> Any employer who violates the provisions of section [215(a)(3)] of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section [215(a)(3)], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. (emphasis added) (This sentence was excluded from §216(b), as it appears in the Appendix attached to the Petition. (C-2))

Congress could not have stated its intent to provide for damages more clearly. As noted by the Seventh Circuit, "legal" relief is "a term commonly understood to include compensatory and punitive damages." (A-8) Therefore this petition does not raise "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 10.1(c). This is true because there are no conflicting opinions and the statute is clear on its face.

While the petition raises five (5) "questions presented for review," only the first two, relating to the scope of relief available under §216(b), are addressed in the "reasons for granting writ" section of the petition. Therefore, only these two questions will be addressed in this brief.

B. When Congress Added the Second Sentence of §216(b) in 1977 it Authorized Compensatory and Punitive Damages Against Employers that Retaliate in Violation of 215(a)(3).

The FLSA, 29 U.S.C.§ 215(a)(3), makes it unlawful for an employer to discharge an employee for testifying in a proceeding under the FLSA. In 1977, as part of Pub. L. 95-151, 91 Stat. 1252 (1977), Congress added a remedial provision which specifically addresses retaliation in violation of §215(a)(3). It makes employers which violate §215(a)(3) "liable for such legal or equitable relief as may be appropriate to effectuate the purposes of [that section]." (emphasis added) The Seventh Circuit properly held that the common or plain meaning of "legal" relief is compensatory and punitive damages. (A-5) See also Curtis v. Loether, 415 U.S. 189, 195-96, 94 S.Ct. 1005, 1009 (1974).

As noted by the Seventh Circuit, there is virtually no legislative history relevant to this new remedial provision. Of course, where a statute is clear on its face there is no need to resort to legislative history. Construction of the term "legal" relief "is guided by the fundamental canon that statutory interpretation begins with the language of the statute itself." Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. ___, 110 S.Ct. 2126, 2130 (1990). In addition to the particular statutory language, the Court looks "to the design of the statute as a whole and to its object and policy." Crandon v. United States, 494 U.S. ___, 110 S.Ct. 997, 1001 (1990).

Effective enforcement of the FLSA obviously depends on the complaints and cooperation of employees of the offending

employer. See Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292, 80 S.Ct. 332, 335 (1960) (§215(a)(3) was designed to insure effective enforcement of the Act by helping employees to feel free to complain about their grievances). Discharging an employee, such as Ms. Travis, who is subpoenaed to testify in a FLSA case in federal court constitutes an outrageous violation of §215(a)(3). Such conduct by employers obviously needs to be discouraged and the 1977 amendment authorizing the broadest relief, including compensatory and punitive damages, is entirely consistent with the "design of the statute as a whole" and its "object and policy."

Judge Easterbrook's opinion for the Seventh Circuit Court of Appeals properly interprets the FLSA, as amended in 1977, and since there are no conflicting decisions, the petition should be denied. The petitioners' attempt to create a conflict does not withstand even minimal scrutiny. None of the decisions cited at page 4 of the petition addresses the 1977 amendment to §216(b) that was interpreted by the Seventh Circuit in this case.

Three of the cases cited by the petitioners were decided before 1977. One of the cases, Marshall v. Brunner, 668 F.2d 748 (3rd Cir. 1982), held that the lower court erred in refusing to assess liquidated damages under the first sentence of §216(b). Another case, Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir. 1982), held that the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq., adopted as an amendment to the FLSA in 1967, does not provide for compensatory and punitive damages. Of course, this case did not involve the second sentence of §216(b), added in 1977 and limited to violations of §215(a)(3). The remaining case, Lorillard v. Pons, 434 U.S. 575, 98 S.Ct. 866 (1978), simply held that there is a right to trial by jury in a private action for lost wages under the Age Discrimination in Employment Act.

C. Contrary to Holding of Seventh Circuit, Jury Verdict and Judgment are Supported by 42 U.S.C. 1985(2).

As a general rule, a prevailing party can "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," so long as it does not alter the judgment. Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20, 99 S.Ct. 740, 749 n. 20 (1979). See also, Thigpen v. Roberts, 468 U.S. 27, 29-30, 104 S.Ct. 2916, 2918 (1984); Chevron, U.S.A. , Inc. v. Natural Resource Defense Council, 467 U.S. 837, 842 n. 7, 104 S.Ct. 2778, 2781 n. 7 (1984). While it is the position of Ms. Travis that 42 U.S.C. §1985(2) does support the jury award of compensatory and punitive damages, and that the Seventh Circuit erred in relying on the intra-corporate conspiracy doctrine, it is not necessary to address the issue at this time because, for the reasons already stated, the petition for a writ of certiorari should be denied.

CONCLUSION

Because the petitioners have identified no cases in conflict with the decision of the Seventh Circuit and because the decision properly interprets the clear language of the 1977 amendment to the FLSA, the petition for a writ of certiorari must be denied.

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